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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 558

MRS. ELLA JAMISON,

Appellant,

vs.

THE STATE OF TEXAS.

APPEAL FROM THE CRIMINAL COURT OF DALLAS COUNTY, TEXAS.

MOTION TO DISMISS OR AFFIRM.

H. P. KUCERA,
R. L. DILLARD, JR.,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

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MRS. ELLA JAMISON,

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vs.

STATE OF TEXAS,

Appellee.

APPEAL FROM THE COUNTY CRIMINAL COURT, DALLAS COUNTY, TEXAS.

MOTION TO DISMISS OR AFFIRM APPEAL.

To the Honorable Justices of Supreme Court of the United States:

A. Comes now the State of Texas, appellee herein, by its counsel and moves this Court to dismiss with costs the appeal taken herein to this Court by Mrs. Ella Jamison upon the following grounds:

I.

This Court does not have jurisdiction to hear this appeal under Section 237 (a) of the Judicial Code as amended by

the Act of February 13, 1925, Chapter 229, 43 Stat. at Large, 936 (U. S. C. A. Title 28, Section 344(a)) because the County Criminal Court of Dallas County is not the "highest court" in the state of Texas "in which a decision in the suit could be had." Appellant could have applied to the District Court of Dallas County for a writ of habeas corpus and if said writ had been refused by the District Court, appellant could have appealed to the Court of Criminal Appeals.

II.

This Court does not have jurisdiction of this appeal because a municipal ordinance is not "a statute of any state" within the meaning of Section 237 of the Judicial Code as amended by the act of February 13, 1925, Chapter 229, 43 Stat. at Large, 936 (U. S. C. A. Title 28, Section 344(a)).

B. In the alternative appellant moves this Court to affirm on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Attached hereto is a brief in support of this motion citing pertinent authorities.

Dated this 20th day of November A. D. 1942.

(Signed) H. P. Kucera,
(Signed) R. L. Dillard, Jr.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 558

MRS. ELLA JAMISON,

Appellant,

vs.

STATE OF TEXAS,

Appellee.

APPEAL FROM THE COUNTY CRIMINAL COURT, DALLAS COUNTY, TEXAS.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM APPEAL.

I.

The appellant claims jurisdiction in this Court under Sec. 237(a) of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 344(a)). This section vests jurisdiction in this Court where there is "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had" in which it is contended that the statute of any state is repugnant to the constitution of the United States, and the decision is in favor of the validity of the statute.

Under the first ground of its motion to dismiss appellee contends that the County Criminal Court of Dallas County is not the highest court in Texas in which a decision in the suit could be had because appellant could have applied to the District Court for a writ of habeas corpus and if it had been denied she could have appealed to the Court of Criminal Appeals, the highest appellate court in Texas in criminal cases. *Ex parte Largent*, 162 S. W. (2d) 419 at 420 par. 1. *Ex parte Slawson*, 141 S. W. (2d) 609 at 610 par. 1. Appellant contends that the ordinance is void on its face because it infringes on her constitutional rights. (Appellant's Statement of Points Relied on, Tr. ——; First and Second Assignment of Error, Tr. ——). If appellant's contention is legally sound, she would have been entitled to a writ of habeas corpus from the District Court or upon denial, by the Court of Criminal Appeals upon an appeal.

The Court of Criminal Appeals says in *Ex Parte Slawson*, 141 S. W. (2d) 609 at 610 par. 1—

"It is observed that relator has had his right of appeal from the justice court to the county court, and his case was finally disposed of in the county court, and under Art. 53 C. C. P., we have no jurisdiction of a further appeal in this matter. However, if the statute itself is void and infringes upon his constitutional rights, then relator would have his right of habeas corpus to relieve himself from custody under the capias pro fine issued under the judgment of conviction in the county court at law." The following cases are to the same effect: *Ex parte Largent*, 162 S. W. (2d) 419 at 420 Par. 1 and cases there cited; *Ex Parte Robinson*, 17 S. W. 1057; and *Ex Parte Smith*, 102 S. W. 115. In *Ex Parte Largent*, 162 S. W. (2d) 419 (appeal dismissed by this Court at the present term) the court said:

Appellant attacks the validity of the judgment of conviction by asserting that the ordinance under which she was convicted is unconstitutional. If the ordinance is void on

its face, then this Court has jurisdiction to so determine in this proceeding.

Had the writ of habeas corpus been denied by the Court of Criminal Appeals, appellant could have then appealed to this Court under Section 237(a) of the Judicial Code. In *Tinsley* v. *Anderson*, 171 U. S. 101 at 105, 18 S. Ct. 805, 43 L. ed. 91, at 96, this Court says:

> But the appellate jurisdiction of this Court from the state court extends to a final judgment or decree in any suit, civil or criminal in the highest court of a state where a decision in the suit could be had, against a title, right, privilege, or immunity, specially set up and claimed under the Constitution or a treaty or statute of the United States. Rev. Stat. 709. Consequently, if the order of the court of criminal appeals of the State of Texas, being the highest court of the state having jurisdiction of the case, dismissing the writ of habeas corpus issued by one of its judges, and remanding the prisoner to custody, denied to him any right specially set up and claimed by him under the Constitution, laws, or treaties of the United States, it is doubtless reviewable by this Court on writ of error.

The denial of a writ of habeas corpus challenging the validity of a statute on constitutional grounds is appealable to this Court from a state court. *New York ex rel Bryant* v. *Zimmerman*, 278 U. S. 63 at 70, 49 S. Ct. 61, 73 L. ed. 184 at 188 and cases there cited.

The Court of Criminal Appeals is the highest court in Texas for the determination of criminal cases hence it must affirmatively appear on the face of the record that a decision in this suit could not have been had in that court or this Court is without jurisdiction under Sec. 237(a) (28 U. S. C. A. 344(a)) to hear this case. *Fisher* v. *Carrico*, 122 U. S. 522, 7 S. Ct. 1227, 30 L. ed. 1192. *McKnight* v. *James*, 155 U. S. 685, at 687, 39 L. ed. 310 at 311, 15 S. Ct. 248.

The accepted course of procedure in challenging the validity of a Texas statute is by applying for a writ of habeas corpus in the District or County Court then appealing to the Court of Criminal Appeals and thence by appeal to this Court. *Collins* v. *Texas*, 223 U. S. 288, 56 L. ed. 439, 32 S. Ct. 286.

II.

The second ground of appellee's motion to dismiss this appeal is based on the contention that a municipal ordinance is not a "state statute" within the meaning of Section 237(a) of the Judicial Code (28 U. S. C. A. 344(a)). We believe that this Court should re-examine the decision in *King Manufacturing Company* v. *Augusta*, 277 U. S. 100, 48 S. Ct. 489, 72 L. ed. 801. The burden that has been placed on this Court in recent years by appeals of this type demonstrates the soundness of the dissenting opinion of Mr. Justice Brandeis in *King Mfg. Company* v. *Augusta*, supra. The reasons are so well presented in Justice Brandeis' opinion in that case that it is not necessary for us to repeat them here.

The decision in the *King Mfg. Co.* case is not consistent with the interpretation of other congressional legislation regulating the appellate jurisdiction of this Court. *Ex Parte Collins*, 277 U. S. 565, 48 S. Ct. 585, 72 L. ed. 990; *Frankfurter & Landis*, The Supreme Court Under The Judiciary Act of 1925, 42 Harvard Law Review, 1 at 24-25; *Dodd*, What is a Statute under the Federal Judicial Code? 38 Yale Law Journal 359; and The Three Judge Rule, 38 Yale Law Journal 955.

III.

Appellee contends that this cause should be affirmed because it is manifest that the questions on which the cause depends are so unsubstantial as not to need further argument.

The City of Dallas clearly has the right to forbid the use of its streets by persons as a place to carry on the business of selling, trading or advertising the selling or trading of merchandise. *West* v. *City of Waco*, 115 Texas 472, 294 S. W. 842; *Ex parte Hogg*, 156 S. W. 931; *Decker* v. *City of Wichita*, 109 Kan. 796, 202 Pac. 89; *Hadfield* v. *Lundin* (Wash.) 168 Pac. 516 L. R. A. 1918B; *Packard* v. *Banton*, 264 U. S. 140, 143, 44 S. Ct. 257, 68 L. ed. 596, 607; *Sproles* v. *Binford*, 286 U. S. 390, 76 L. ed. 1167, 52 S. Ct. 581; *Stephenson* v. *Binford*, 287 U. S. 256, 264, 77 L. ed. 288, 294; *City of Dallas* v. *Harris*, 157 S. W. (2d) 710 writ of error refused.

The appellee was attempting to use the streets for the advertisement of certain books which were being offered for sale by the Watch Tower Society (S. F. 2). The constitutional guarantees of freedom of speech and freedom of religion do not protect individuals who attempt to commercialize either of these freedoms. *Schneider* v. *State*, 308 U. S. 147, 165, 84 L. ed. 155, at 166; *Jones* v. *City of Opelika*, 62 S. Ct. 1231 86 L. ed.; *Valentine* v. *Chrestensen*, 62 S. Ct. 920. Appellants have attempted to disguise the commercialization of their religion by printing on one side of the pamphlet an announcement of a speech while on the other side they have printed a description and an advertisement of certain books which they were offering for sale in an effort to raise funds. The distribution of this type of hand bill is not protected by the constitutional guarantees relating to freedom of religion and freedom of speech. *Valentine* v. *Chrestensen*, 62 S. Ct. 920, 86 L. ed. Advance opinions, Page 861, 862. In that case the court said:

"This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not

unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct."

This Court has many times discussed the question of freedom of speech and freedom of religion but has never taken the occasion to consider the reverse of the situation i. e., the rights of other individuals to be free *from* the speech and religion of persons like this appellant. The public is entitled to be free from harassment and annoyance from attempts by people like the appellant to force their speech and religion upon them.

The commercial advertising on the pamphlets which the appellants were handing out distinguishes this case from the cases cited by appellee and places it squarely within the doctrine announced by this Court in *Valentine* v. *Chrestensen, supra.* The appeal is without substantial grounds and should be affirmed without further argument.

Respectfully submitted,

(Signed) H. P. KUCERA,
(Signed) R. L. DILLARD, JR.